

State of South Dakota

EIGHTY-FIFTH SESSION
LEGISLATIVE ASSEMBLY, 2010

517R0407

SENATE JUDICIARY ENGROSSED NO. **HB 1109** 3/2/2010

Introduced by: Representatives Lust, Cutler, Deadrick, Engels, and Feinstein and Senators
Knudson, Heidepriem, and Turbak Berry

1 FOR AN ACT ENTITLED, An Act to revise certain provisions related to business
2 organizations and to provide for certain filing fees relevant thereto.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 47-34A-408 be amended to read as follows:

5 47-34A-408. (a) A limited liability company shall provide managers and members and ~~their~~
6 the respective agents and attorneys of members access for proper purposes to its records, if any,
7 at the company's principal office or other reasonable locations specified in the operating
8 agreement. The company shall provide former members and their respective agents and
9 attorneys access for proper purposes to records pertaining to the period during which they were
10 members. The right of access provides the opportunity to inspect and copy records during
11 ordinary business hours. The company may impose a reasonable charge, limited to the costs of
12 labor and material, for copies of records furnished.

13 (b) A limited liability company shall furnish to a manager:

14 (1) Without demand, information concerning the company's business or affairs



1 reasonably required for the proper exercise of the manager's performance of the
2 manager's duties under the operating agreement or this chapter; and

3 (2) On demand, other information concerning the company's business or affairs, except
4 to the extent the demand or the information demanded is unreasonable or otherwise
5 improper under the circumstances.

6 (c) A limited liability company shall furnish to a member, and to the legal representative of
7 a deceased member or member under legal disability:

8 (1) Without demand, information concerning the company's business or affairs
9 reasonably required for the proper exercise of the member's rights and performance
10 of the member's duties under the operating agreement or this chapter; and

11 (2) On demand, other information concerning the company's business or affairs, except
12 to the extent the demand or the information demanded is unreasonable or otherwise
13 improper under the circumstances.

14 ~~(c)~~(d) A member has the right upon written demand given to the limited liability company
15 to obtain at the company's expense a copy of any written operating agreement.

16 Section 2. That chapter 47-34A be amended by adding thereto a NEW SECTION to read
17 as follows:

18 (a) A foreign limited liability company may become a domestic limited liability company
19 only if the domestication is permitted by the organic law of the foreign limited liability
20 company.

21 (b) A domestic limited liability company not required by law to be a domestic limited
22 liability company may become a foreign limited liability company if the domestication is
23 permitted by the laws of the foreign jurisdiction. Regardless of whether the laws of the foreign
24 jurisdiction require the adoption of a plan of domestication, the domestication shall be approved

1 by the adoption of the limited liability company of a plan of domestication in the manner
2 provided in sections 2 to 8, inclusive, of this Act.

3 Section 3. That chapter 47-34A be amended by adding thereto a NEW SECTION to read
4 as follows:

5 (a) The plan of domestication shall include:

6 (1) A statement of the jurisdiction in which the limited liability company is presently
7 domesticated; and

8 (2) A statement of the jurisdiction in which the limited liability company is to be
9 domesticated.

10 (b) The plan of domestication may include:

11 (1) As a referenced attachment, the articles of organization of the limited liability
12 company upon its domestication; and

13 (2) Any other provision relating to the domestication.

14 (c) The plan of domestication may also include a provision that the plan may be amended
15 at any time prior to filing the document required by the laws of this state or the other jurisdiction
16 to consummate the domestication.

17 Section 4. That chapter 47-34A be amended by adding thereto a NEW SECTION to read
18 as follows:

19 In the case of a domestic limited liability company:

20 (a) Unless the articles of organization or a written operating agreement of the limited
21 liability company provides otherwise, the members of the limited liability company shall
22 approve the plan of domestication by the members in the manner provided in the limited
23 liability company's operating agreement for amendments to the operating agreement or, if no
24 such provision is made in an operating agreement, by all the members.

1 (b) If an amendment to a plan of domestication is made in accordance with subsection (c)
2 of section 3 of this Act, and articles of domestication already have been filed with the secretary
3 of state, amended articles of domestication shall be filed with the secretary of state before the
4 effective date of any certificate of domestication issued by the secretary of state for the articles
5 of domestication which the amended articles are to supersede.

6 Section 5. That chapter 47-34A be amended by adding thereto a NEW SECTION to read
7 as follows:

8 (a) After the domestication of a foreign limited liability company is approved in the manner
9 required by the laws of the jurisdiction in which the limited liability company is organized, the
10 limited liability company shall file with the secretary of state articles of domestication setting
11 forth:

12 (1) The name of the limited liability company immediately prior to the filing of the
13 articles of domestication and, if that name is unavailable for use in this state or the
14 limited liability company desires to change its name in connection with the
15 domestication, a name that satisfies the requirements of § 47-34A-105;

16 (2) The plan of domestication; and

17 (3) The original jurisdiction of the limited liability company and the date the limited
18 liability company was organized in that jurisdiction, and each subsequent jurisdiction
19 and the date the limited liability company was domesticated in each such jurisdiction,
20 if any, prior to the filing of the articles of domestication.

21 (b) The articles of domestication shall have attached articles of organization that comply
22 with the requirements contained in § 47-34A-203.

23 (c) If the secretary of state finds that the articles of domestication comply with the
24 requirements of law and that all required fees have been paid, the secretary of state shall issue

1 a certificate of domestication.

2 (d) The articles of domestication shall become effective pursuant to § 47-34A-206.

3 (e) A foreign limited liability company's existence as a domestic limited liability company
4 shall begin when the certificate of domestication is effective. Upon becoming effective, the
5 certificate of domestication shall be conclusive evidence that all conditions precedent required
6 to be performed by the foreign limited liability company have been complied with and that the
7 limited liability company has been organized under this chapter.

8 (f) If the foreign limited liability company is authorized to transact business in this state
9 under § 47-34A-1004, its certificate of authority is canceled automatically on the effective date
10 of the certificate of domestication issued by the secretary of state.

11 Section 6. That chapter 47-34A be amended by adding thereto a NEW SECTION to read
12 as follows:

13 (a) If a domestic limited liability company has approved, in the manner required by section
14 4 of this Act, a plan of domestication providing for the limited liability company to be
15 domesticated under the laws of another jurisdiction, the limited liability company shall file with
16 the secretary of state articles of organization surrender setting forth:

- 17 (1) The name of the limited liability company;
- 18 (2) The limited liability company's new jurisdiction of organization;
- 19 (3) The plan of domestication;
- 20 (4) A statement that the articles of organization surrender are being filed in connection
21 with the domestication of the limited liability company as a foreign limited liability
22 company to be organized under the laws of another jurisdiction and that the limited
23 liability company is surrendering its certificate of organization under the laws of this
24 state;

(5) A statement that the limited liability company revokes the authority of its registered agent to accept service on its behalf and appoints the secretary of state as its agent for service of process in any proceeding based on a cause of action arising during the time it was organized in this state;

(6) A mailing address to which the secretary of state may mail a copy of any process served on the secretary of state under subdivision (5); and

(7) A commitment to notify the secretary of state in the future of any change in the mailing address of the limited liability company.

(b) If the secretary of state finds that the articles of organization surrender comply with the requirements of law and that all required fees have been paid, the secretary of state shall issue a certificate of organization surrender.

(c) The limited liability company shall automatically cease to be a domestic limited liability company when the certificate of organization surrender becomes effective.

(d) If the former domestic limited liability company intends to continue to transact business in the state, within thirty days after the effective date of the certificate of organization surrender issued pursuant to subsection (b), the former domestic limited liability company shall deliver to the secretary of state an application for a certificate of authority to transact business in the state pursuant to § 47-34A-1002 together with a certificate of existence or a record of similar import authentication by the secretary of state or other official having custody of company records in the state or country under whose law it is organized together with any fee required by § 47-34A-1206 and any other required fee.

Section 7. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

(a) When a foreign limited liability company's certificate of domestication in this state

becomes effective, with respect to that limited liability company:

(1) The title to all real estate and other property remains in the limited liability company without reversion or impairment;

(2) The liabilities remain the liabilities of the limited liability company;

(3) A proceeding pending may be continued by or against the limited liability company as if the domestication did not occur;

(4) The articles of organization attached to the articles of domestication constitute the articles of organization of the limited liability company; and

(5) The limited liability company is deemed to:

(i) Be organized under the laws of this state for all purposes;

(ii) Be the same limited liability company as the limited liability company that existed under the laws of the jurisdiction or jurisdictions in which it was originally organized or formerly domesticated; and

(iii) Have been organized on the date it was originally formed or organized.

(b) Any member of a foreign limited liability company that domesticates into this state who, prior to the domestication, was liable for the liabilities or obligations of the limited liability company is not released from those liabilities or obligations by reason of the domestication.

Section 8. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

(a) Unless the domestic limited liability company's articles of organization, operating agreement, or the plan of domestication provides otherwise, after the domestication has been authorized and at any time before the effective date of the certificate of domestication issued by the Office of the Secretary of State, the domestication may be abandoned by majority vote of the members of the domestic limited liability company.

1 (b) If a domestication is abandoned under subsection (a) after articles of organization
2 surrender have been filed with the secretary of state but before the certificate of organization
3 surrender has become effective, written notice that the domestication has been abandoned in
4 accordance with this section shall be filed with the secretary of state prior to the effective date
5 of the certificate of organization surrender. The notice shall take effect upon filing and the
6 domestication shall be deemed abandoned and shall not become effective.

7 (c) If the domestication of a foreign limited liability company into this state is abandoned
8 in accordance with the laws of the foreign jurisdiction after articles of domestication have been
9 filed with the secretary of state but before the certificate of domestication has become effective
10 in this state, written notice that the domestication has been abandoned shall be filed with the
11 secretary of state prior to the effective date of the certificate of domestication. The notice shall
12 take effect upon filing and the domestication shall be deemed abandoned and shall not become
13 effective.

14 Section 9. That chapter 47-34A be amended by adding thereto a NEW SECTION to read
15 as follows:

16 (a) A domestic limited liability company may be converted to a different type of entity
17 pursuant to this section by adopting a plan of conversion.

18 (b) The terms and conditions of a plan of conversion of a limited liability company to a
19 different type of entity must be approved by all of the members or by a number or percentage
20 of members specified in the operating agreement.

21 (c) To effect a conversion, the converting limited liability company must act on and the
22 members of the limited liability company must approve a plan of conversion containing the
23 provisions required by section 10 of this Act.

24 (d) A conversion may not take effect if the conversion is prohibited by or inconsistent with

1 the laws of this state, and the formation, incorporation, or organization of the converted entity
2 under the plan of conversion must be effected in compliance with those laws pursuant to the
3 plan of conversion.

4 (e) At the time a conversion takes effect, each member of the converting limited liability
5 company, other than those who receive payment of their membership interest under any
6 applicable provisions of this chapter, has, unless otherwise agreed to by that member, a
7 membership interest in, and is an owner, partner, or member of, the converted entity.

8 (f) A limited liability company may not convert under this section if a member or manager
9 of the limited liability company, as a result of the conversion, becomes personally liable,
10 without the consent of the member or manager, for a liability or other obligation of the
11 converted entity.

12 Section 10. That chapter 47-34A be amended by adding thereto a NEW SECTION to read
13 as follows:

14 (a) A plan of conversion must include:

15 (1) The name of the converting limited liability company;

16 (2) The name of the converted entity;

17 (3) A statement that the converting limited liability company is continuing its existence
18 in the organizational form of the converted entity;

19 (4) A statement of the type of entity that the converted entity is to be;

20 (5) The manner and basis of converting the membership interests of the converting
21 limited liability company into ownership or membership interests of the converted
22 entity;

23 (6) Any certificate of formation required to be filed under this chapter if the converted
24 entity is a filing entity; and

(7) The certificate of formation or similar organizational document of the converted entity if the converted entity is not a filing entity.

(b) An item required by subsection (a)(6) or (7) may be included in the plan of conversion by an attachment or exhibit to the plan.

Section 11. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

A plan of conversion may include other provisions relating to the conversion that are not inconsistent with the laws of this state.

Section 12. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

The conversion of a limited liability company is effective upon the filing of the plan of conversion with the secretary of state, or at such later date as the plan of conversion may provide.

Section 13. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

If a conversion takes effect:

(a) The converting limited liability company continues to exist without interruption in the organizational form of the converted entity rather than in the organizational form of the converting limited liability company;

(b) All rights, title, and interests to all property owned by the converting limited liability company continues to be owned, subject to any existing liens or other encumbrances on the property, by the converted entity in the new organizational form without:

(1) Reversion or impairment;

(2) Further act or deed; or

1 (3) Any transfer or assignment having occurred;

2 (c) All liabilities and obligations of the converting limited liability company continue to be
3 liabilities and obligations of the converted entity in the new organizational form without
4 impairment or diminution because of the conversion;

5 (d) The rights of creditors or other parties with respect to or against the previous owners or
6 members of the converting limited liability company in their capacities as members or managers
7 in existence when the conversion takes effect continue to exist as to those liabilities and
8 obligations and may be enforced by the creditors and obligees as if a conversion had not
9 occurred;

10 (e) A proceeding pending by or against the converting limited liability company or by or
11 against any of the converting limited liability company's members or managers in their
12 capacities as members or managers may be continued by or against the converted entity in the
13 new organizational form and by or against the previous members or managers without a need
14 for substituting a party;

15 (f) The membership interests of the converting limited liability company that are to be
16 converted into ownership or membership interests of the converted entity as provided in the plan
17 of conversion are converted as provided by the plan, and the former members and managers are
18 entitled only to the rights provided in the plan of conversion or elsewhere provided in this
19 chapter;

20 (g) If, after the conversion takes effect, an owner or member of the converted entity as an
21 owner or member is liable for the liabilities or obligations of the converted entity, the owner or
22 member is liable for the liabilities and obligations of the converting limited liability company
23 that existed before the conversion took effect only to the extent that the owner or member:

24 (1) Agrees in writing to be liable for the liabilities or obligations;

(2) Was liable, before the conversion took effect, for the liabilities or obligations; or

(3) By becoming an owner or member of the converted entity, becomes liable under other applicable law for the existing liabilities and obligations of the converted entity; and

(h) In a proceeding to enforce any obligation or right of dissenting owners or members of the converting domestic entity, the provisions of § 15-6-4(d) govern the service of process.

Section 14. That chapter 47-34A be amended by adding thereto a NEW SECTION to read as follows:

A member or manager of a limited liability company shall be fully protected in relying in good faith upon the records of the limited liability company and upon such information, opinions, reports, or statements presented to the limited liability company by any of its other managers, members, officers, employees, or committees of the limited liability company, or any other person, as to matters the member or manager reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the limited liability company, including information, opinions, reports, or statements as to the value and amount of the assets, liabilities, profits, or losses of the limited liability company or any other facts pertinent to the existence and amount of assets from which distributions to members might properly be paid.

Section 15. That § 47-34A-1206 be amended to read as follows:

47-34A-1206. The secretary of state may charge the following fees:

(a) For amending or restating the articles of organization in the case of a domestic limited liability company, a filing fee of sixty dollars. For amending the registration in the case of a foreign limited liability company, a filing fee of seven hundred fifty dollars;

- 1 (b) For filing articles of termination, ten dollars;
- 2 (c) For filing articles of merger, sixty dollars;
- 3 (d) For filing a statement of dissociation, ten dollars;
- 4 (e) For filing an application to reserve a name, twenty-five dollars;
- 5 (f) For issuing a certificate of existence, twenty dollars;
- 6 (g) For filing an application for registration of name, twenty-five dollars;
- 7 (h) For filing an annual renewal of registration, a limited liability company which has in
- 8 effect a registration of its name, may renew such registration from year to year by
- 9 annually filing an application for renewal setting forth the facts required to be set
- 10 forth in an original application for registration and a certificate of good standing as
- 11 required for the original registration and by paying a fee of fifteen dollars. A renewal
- 12 application may be filed between the first day of October and the thirty-first day of
- 13 December in each year and shall extend the registration for the following year;
- 14 (i) For acting as agent for service of process the secretary of state shall charge and
- 15 collect at the time of such service thirty dollars which may be recoverable as taxable
- 16 costs by the party to the suit or action causing the service to be made if the party
- 17 prevails in the suit or action;
- 18 (j) For filing articles of domestication, one hundred fifty dollars;
- 19 (k) For filing articles of organization surrender, one hundred fifty dollars;
- 20 (l) For filing a plan of conversion, one hundred fifty dollars.

21 Section 16. That § 47-1A-728 be amended to read as follows:

22 47-1A-728. ~~Unless otherwise provided in the articles of incorporation, directors are elected~~

23 ~~by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which~~

24 ~~a quorum is present.~~ Shareholders may cumulate their votes for directors. The right to cumulate

- 1 votes for directors means that the shareholders are entitled to multiply the number of votes that
- 2 they are entitled to cast by the number of directors for whom they are entitled to vote and cast
- 3 the product for a single candidate or distribute the product among two or more candidates.